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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

NO. 78-94

JAMES LARRY PENNINGTON,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

James Larry Pennington prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit sustaining his conviction by the United States District Court for the Southern District of Florida of interstate transportation of a firearm by a felon in violation of 15 U.S.C. 902.

OPINIONS BELOW

The most recent decision of the Fifth Circuit and the one from which certiorari is sought here was on April 20, 1971, printed in Appendix A, p. 1a, *infra*, and reported at ____ F.2d ____. A petition for rehearing was denied by decision of June 8, 1971, printed in Appendix A, p. 9a. The judgement was on June 16, 1971 and is printed in Appendix A, p. 23. Earlier the Fifth Circuit

had reached a contrary result in petitioner's favor by a decision on June 29, 1970, printed in Appendix A, p. 10a. A petition for rehearing by the government to the earlier decision was granted by a decision on August 12, 1970, printed in Appendix A, p. 19a. The judgment of the District Court is unreported and is printed in Appendix A, p. 21a. A still earlier decision by the Fifth Circuit reversing a prior conviction in this case is reported at 392 F.2d 421 (1968).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) authorizing the grant of a writ of certiorari to a United States Court of Appeals upon the petition of a party to a criminal case after rendition of judgment. The decision of the Fifth Circuit from which review here is sought was on April 20, 1971. The decision denying rehearing was on June 8, 1971. An order by Mr. Justice Black extended the time for filing this petition to July 19, 1971.

QUESTIONS PRESENTED FOR REVIEW

1.

Was the seizure of a pistol in violation of the Fourth Amendment where it was taken from the closed glove compartment of an automobile pursuant to and alleged inventory search prior to impounding the automobile after a traffic arrest, particularly where the arresting officers gave shifting reasons for the search and there were other indications that the search was improper.

2.

Was it proper testimony consonant with Due Process to convict for alleged transportation of a firearm by a

felon for two FBI agents to testify on direct that they called in appellant for questioning allegedly about an entirely different matter and during the questioning received a negative answer to the question of whether he knew it was a felony for him to transport a weapon interstate when the government in a previous trial contended that such was "rebuttal testimony . . . directed toward impeachment of [petitioner and] could not have been illustrated on direct examination."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of the United States:

Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment:

> No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . . .

Title 15 USC, sections 902(e) & (f) (repealed by Act June 19, 1968, P.L. 90-351, Title IV, Sec. 906 82 Stat. 234):

> (e) It shall be unlawful for any person who is under indictment or who has been convicted of a crime punishable by imprisonment for a term exceeding one year or who is a fugitive from justice

to ship, transport, or cause to be shipped or transported in interstate or foreign commerce any firearm or ammunition.

(f) It shall be unlawful for any person who has been convicted of a crime punishable by imprisonment for a term exceeding one year or is a fugitive from justice to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce, and the possession of a firearm or ammunition was shipped or transported or received, as the case may be, by such person in violation of this chapter.

STATEMENT OF THE CASE

Petitioner was convicted of interstate transportation of a firearm by a felon in violation of 15 U.S.C. 902. The firearm was a pistol found in the glove compartment of an automobile he was driving when stopped for a traffic offense in Miami Beach. Petitioner admittedly had previously owned the pistol in Georgia (but his evidence was that he had sold it to a friend with whom he had come with on the current trip to Miami). A previous conviction of petitioner was reversed by the Fifth Circuit because of the reliance by the trial court and the U. S. Attorney on the unconstitutional presumption of transportation set out in 15 U.S.C. 902(f). *Pennington v. U.S.*, 392 F.2d 421. The Fifth Circuit, pointing out that the government "contends that the law is settled that a search made incidental to an arrest, which search is made for the purpose of discovery of weapons . . . is lawful, "directed that on retrial the trial court should determine "what effect on search and seizure of an automobile is permissible in light of our recent decisions in *Amador-Gonzalez v. United States,* 5 Cir., decided January 10, 1968 . . . as well as the decision of the Su-

preme Court in *Harris v. United States,* U.S. , S.Ct. , decided March 5, 1968."

Petitioner was arrested in the early morning hours in Miami Beach for reckless driving. The testimony of the two police officers who made the arrest was in considerable conflict as to how reckless he was. One said he was going 80 miles an hour; the other said in excess of 50 and not 80 (R.* 369; R. 336-337). The officer who issued the ticket said he would not charge reckless driving if the speed were only 60 miles an hour but would merely charge speeding (R. 343). One officer first said he was "unable to determine" if petitioner ran any red lights (R. 336); then he claimed there were two run in the last part of the pursuit (R. 339). The other officer said he thought the lights were all green, then said one light was run red in the first part of the pursuit (R. 370). In an earlier motion to suppress hearing the officers had acquiesced that petitioner was arrested for "reckless driving by speeding" and made no mention of any red lights allegedly run (R. 265).

At any regard petitioner was charged with some type of reckless driving, but the actual charge ticket was lost by the time of his first trial (R. 55, 339). The officers claimed their intent from the beginning was to arrest him for reckless driving. At one point, however, one of them indicated that the reckless driving charge was not immediately leveled (R. 99-100; 338):

Q. Didn't you ask him to get up against the automobile [spread eagle]?

---

*The R reference is to the record in the Court of Appeals. Petitioner has requested the record be sent up to this Court.

A. After he was arrested for reckless driving, yes, sir.

Q. Well, that is when you first saw him wasn't it?

A. No, sir.

The arresting officer, Young, directed the assisting officer, Wilson, to search petitioner's car. Petitioner contends that the search was unlawful and that the pistol discovered should be suppressed. In the first trial the principal justification by the government for the search was, as the Fifth Circuit noted, "that a search made incidental to an arrest, which search is made for the purpose of discovery of weapons which might put the arresting officer in danger or might facilitate escape, is lawful." 392 F.2d at 423. It was also said that the search was for inventory purposes incident to impounding the car. By the time of the second trial the inventory purpose had become "basically" the "only purpose" of the search (R. 31-34). But the other alleged reasons for the search were alluded to (R. 34-35), and one of the officers admitted he had previously testified that in searching the car, they were investigating the offense of reckless driving, although he did not say what fruits of that crime they sought (R. 39-40).

It was claimed by the arresting officers that on reckless driving arrests the automobile is towed in—to the police station according to earlier testimony (R. 311) but to the lot of a wrecker company according to the testimony at the second trial (R. 28). One officer said, "we as a rule generally tow the car in" (R. 61). Both officers claimed it was necessary to search the car. The arresting officer said the search was for inventory purpose and "it began when I arrived on the scene" (R. 62).

An inventory list is supposed to be made but it is not clear one was made in this instance; at any regard it is not now in existence (R. 29-30). The arresting officer admitted that he had earlier testified that it was not "standard police procedure at Miami Beach" but it was "my procedure" to search the car (R. 54-55).

After the pistol was discovered the officers asked petitioner if it were his and why he had it (R. 46-47, 78-79). Petitioner's counsel contended at the beginning of trial and in the presence of the officers (R. 6-8, 20) that he anticipated that the government might rely on the inventory claim but that it was negated by the speed of the search and the "why" questions.

Petitioner was cooperative with the officers (R. 35). He had "quite a bit of money on him" (R. 66-67). On a reckless driving charge, it was necessary for him to post $100 cash bond (R. 61). It is undisputed that he was not intoxicated (R. 82). Why the City of Miami Beach would insist on impounding his car rather than allowing him to drive it to the station is not explained. Had the officers wished to obtain a search warrant there was a place available for them to do so (R. 40).

Petitioner was arrested on the traffic incident in October, 1965. Although a state charge regarding the pistol was made against him, he was not indicted on the federal charge until October, 1966 (R. 155). In March, 1966, he was asked to come to the F.B.I. office in Atlanta because "his name had come up that he might possibly be involved" in some robberies in Jacksonville (R. 153-154). He was given the *Miranda* advisements and then later in the session the Miami matter came up. One of the agents asked: "Aren't you aware that this [trans-

porting a firearm] is a felony?" Petitioner allegedly said no. Although this agent agreed that appellant did not, at least, "in so many words," admit transporting the pistol, this testimony was allowed to go to the jury on the government's direct case (R. 156).

In the first trial this testimony was put in by the government as rebuttal. The government had claimed (R. 160) that it was "rebuttal testimony . . . directed toward impeachment of appellant with regard to prior statements which were inconsistent with his testimony. . . . [and they] could not have been illustrated on direct examination." Petitioner objected to the testimony in this trial. He did not testify to the jury in his second trial.

In neither of its two opinions did the Fifth Circuit discuss the F.B.I. testimony. In its withdrawn opinion the Fifth Circuit apparently rejected petitioner's claim that the search was pretextual but then seemed to imply that it was such:

> The procedure followed by the police officers in this case might well have been reasonable, and no search warrant required, if preservation of the contents had been the sole purpose of the activity. We do not decide the point because of the presence of another factor.
>
> That factor is found in the testimony of Mr. Young that the arresting officers were also looking "for any weapon" in order to protect themselves. Nothing was found in the car but a weapon, a forty-five pistol, fully loaded. That weapon provided the essential ingredient of this prosecution. It had no relevancy to the traffic offense for which Pennington had been arrested, *it was not a fruit of that offense, and it posed no threat to the safety of the*

> *arresting officers. Pennington was already in custody, some distance from the car, making no move toward the vehicle.* [Emphasis supplied. Query: If the officers' testimony that they were searching for fruits of the crime and were engaging in a necessary weapons check is rejected, why is their testimony regarding the shady inventory search accepted so completely?]
>
> That being true, the vehicle could not lawfully be searched without a warrant. The motion to suppress the weapon as evidence should have been granted.

The Fifth Circuit subsequently granted a government motion for rehearing directed to "the question of whether our judgment of reversal should be permitted to stand in light of Chambers v. Maroney, No. 830, [decided June 22, 1970] 38 L.W. 4547, and four cases decided by the Supreme Court on June 29, 1970: Perini v. Colosimo, No. 801, ... U.S. ..... (1970) 38 L.W. 3520; Crouse v. Wood, No. 936, ... U.S. ..... (1970) 38 L.W. 3520; Hocker v. Heffley, No. 1195, ... U.S. ..... (1970) 38 L.W. 3520, and Kelley v. Arizona, 1232 Misc., 38 L.W. 3521, vacating the judgments below and remanding the cases to the respective courts below for reconsideration in light of Chambers v. Maroney."

The Fifth Circuit then withdrew its first decision and held the search to be reasonable in light of *Chambers v. Maroney:*

> Personal effects lawfully contained within lawfully impounded automobiles must be protected for the benefit of the owners. Officers cannot send property off in the custody of others without knowing what is due to be returned. The only reasonable method for the prevention of such an occurrence after a valid

arrest necessitating the detention of the automobile is to inventory contents and take receipts from the person who is thereafter to be responsible. That was clearly the real purpose of the inventory here undertaken, which uncovered the pistol.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Decided An Important Question Of Federal Law In Regard To Alleged Automobile Inventory Searches Which Has Not Been, But Should Be, Settled By This Court.

As the Fifth Circuit noted in its withdrawn decision, the facts of the instant case "are not the same, although similar" to the facts of *Harris v. U.S.*, 390 U.S. 234 (App. A., 10a). As that Court pointed out, all the police officer in *Harris* was doing when he discovered an incriminating registration card was rolling up a car window and "was looking for nothing and expecting nothing."

The Fifth Circuit then went on to hold the instant search illegal because it was not just for inventory but was also for weapons. In even finding then that the "basic purpose" of the search was inventory (App. A., 16a), the Court below overlooked the minimum emphasis put on inventory in the first trial and earlier hearings. In fact in sending the case back for retrial on the search question after its 1968 reversal (392 F.2d 421), the Court then correctly noted that the government's essential (pre-Harris) contention was "that the law is well settled that a search made incidental to an arrest, which search is made for the purpose of discovery of weapons which might put the arresting officer in danger or might facilitate escape, is lawful" (392 F.2d at 423).

The question of the propriety of inventory searches is still unsettled. In *Harris v. U.S.*, 390 U.S. 234, this Court did not sanction inventory searches but only plain-sight discoveries:

> "The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. . . . [T]he discovery of the card was not the result of a search of the car while it was in police custody. . . . Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible."

Mr. Justice Douglas, concurring in *Harris*, pointed out that the card was discovered by the officers "while engaged in the performance of their duty to protect the car, and not engaged in an inventory or other search of the car, . . ." See also *People v. Sullivan*, 292 N.Y.S. 2d 37, where an "inventory" search of an automobile was held improper against the contention of the prosecution that "inventory" is not a "search" within the meaning of the Fourth Amendment. The court in *Sullivan* thought that absent either a warrant, permission, an incident-to-arrest reason, or some special reason making it dangerous to wait to get a warrant, a search could not be justified.

The problem with allowing just any search, merely by labeling it "inventory", is that pretext searches are thereby encouraged. It is almost impossible for petitioner to clearly prove what the record in this case screams happened: he would have been given a ticket merely for speeding if the gun had not been discovered or at least allowed to drive his car to the police station to post a cash bond.

The several versions of the pursuit and arrest recited by the two police officers in the several hearings are so replete with discrepancies that it is obvious they are either distorting what happened or trying to supply details to suit whatever theory of the case they think is being followed. Police officers, as do most witnesses, tend to identify with their side of the case. For example, in this trial, one officer could not recall if petitioner had given them permission to search the car (App. 49-50). In the first trial he testified that appellant did not give permission (R. 374-375). See the interesting study in 4 *Crim Law Bul* 549, "Patterns of Arrests", regarding whether police officers distort the facts of an arrest to get around *Mapp v. Ohio*, 367 U.S. 643.

II. The Decision Below Is Inconsistent With Decisions Of This Court And Is Therefore Incorrect.

A. The decisions of this Court under the Fourth Amendment forbid gratuitous and pretextual searches of an automobile after it is stopped for a traffic violation.

The Fifth Circuit initially reached the correct decision—that the search was illegal. The decision of this Court in *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, supports the early decision. Insofar as one of the early claims of one of the searching officers was that he was looking for fruits of the crime (of reckless driving!), the requirement of *Dyke* applies that there be probable cause for a warrantless search of an automobile to find the instrumentality, etc. of a crime.

Admittedly at least a part of the reason the officers looked through petitioner's car was *to search it for weapons*. The Fifth Circuit's initial decision that the search

was thereby illegal is supported by this Court's decision in *Chimel v. California,* 395 U.S. 752, which held that an "incidental" search may not extend beyond a necessary area. See footnote 6 of Mr. Justice Harlan's dissent in *Chambers* which assumes *Chimel* applies to automobiles. See also footnote 8 of the majority opinion where the Court said that the search in Chambers "cannot be justified as a search incident to arrest." As the Fifth Circuit noted in its initial decision an incidental search was unjustified because petitioner "was already in custody, some distance from the car, making no move toward the vehicle."

The Fifth Circuit of course reopened the question of the validity of the search of petitioner's car, directing particular attention to this Court's decision in *Chambers v. Maroney,* 399 U.S. 42 (1970). *Chambers* held that where there was probable cause for the arrests of the occupants of an automobile for robbery and where an immediate search of the car would have been constitutionally permissible, it was not unreasonable to take the car to the police station to search it under the circumstances of that case. The instant case does not involve the basic issue involved in *Chambers.* The search in this case was at the scene, and admittedly (at least by the time of the second trial) there was no probable cause for a general search. The government in the second trial rested its entire claim that the search was valid on the alleged necessity to inventory the contents of the car preparatory to impounding it.

In three of the cases ordered remanded to the Circuits for further consideration in the light of *Chambers,* the searches had been invalidated on appeal because the

searches of the cars occurred after the occupants had been hauled away in police custody. In all three cases, likely probable cause for an immediate search existed. In *Colosimo v. Perini,* 415 F.2d 804 (CA6), the defendant was operating out of an automobile and was observed in conduct "which made it quite clear that he and another were engaged in the business of stealing from cars parked at the airport."

In *Wood v. Crouse,* 417 F.2d 394 (CA10), the arresting officer had been "officially advised to watch for a certain described vehicle whose occupants had attempted to pass a check suspected of being one of those taken in the burglary." In *Heffley v. Hocker,* 420 F.2d 881 (CA 9), the arresting officer had received reports that the occupant of a certain car had been selling guns and upon stopping it for a check saw "large quantities of guns, partially covered;" he arrested the occupant for still another gun whose butt was in sight.

Of the four cases remanded by this Court, the closest to the instant case is *State v. Kelley,* 454 P.2d 563. But even in that case the Supreme Court of Arizona found justification of a search that revealed a bag of marijuana by the circumstances and suspicious actions of the driver. Moreover, the Arizona courts had upheld the search, and this Court vacated the judgment and remanded the case for further consideration. *Kelley v. Arizona,* 399 U.S. 525 (1970).

B. The conviction below, relying as it does upon FBI testimony which was improper and of no probative value, conflicts with this Court's decision in *Tot v. U.S.,* 319 U.S. 463.

The only evidence of transportation of the pistol in

question, aside from its presence in the car with petitioner and his earlier ownership of it in Georgia, is the testimony of two F.B.I. agents regarding some ambiguous statements of appellant. Given the heroic aura accorded the F.B.I. in the mind of the public, this testimony would have undue weight. Therefore, if it was unfairly obtained or unfairly used, it should not be allowed.

The circumstances of the F.B.I. interrogation of petitioner and of his chief supporting witness (R. 465 ff) raise all sorts of questions. The probative effect of petitioner's alleged statement, in response to a question, that he did not know it was illegal for him to transport a firearm should be zero on the question of whether he did transport the firearm. Since by *Tot v. U.S.*, 319 U.S. 463, there can be no presumption of transportation merely from the presence of the pistol in the car with petitioner in Miami, it would seem that the government has been able to add zero to zero and come out with the sum of conviction.

III. The Decision Regarding The Search Is Inconsistent With Decisions Of Other Courts Of Appeal And State Appellate Courts.

Since this Court's *Harris* decision several courts have held inventory searches to be proper. See cases collected in supplement to the anno at 10 ALR 3d 314, section 9. But other Courts have held alleged inventory searches to be unnecessary or improper. See, *e.g.*, *Virgil v. Superior Court*, 268 Cal. App. 2d 127, 73 Cal. Rptr. 793. And the New York Court in *Sullivan, supra,* held an "inventory" to be a search covered by the Fourth Amendment. Other decisions, without directly discussing inventory, have disapproved searches similar to the

one in the instant case. See, *e.g., Barrentine v. U.S.*, 434 F.2d 636 (CA 9); *People v. Lewis*, 34 Ill. 2d 211, 215 N.E.2d 283.

In fact a Florida Court sustained a motion to suppress in a state prosecution from the very search involved here. It seems unfair to make the defendant serve time on this federal charge, which is a double-jeopardy duplicate of a Florida charge leveled against him for allegedly possessing the identical firearm and as to which the proper Florida court suppressed the evidence. *Cf. Navarro v. U.S.*, 400 F.2d 315 (CA 5), which holds that federal law governs a federal search in a state court matter. (Should not comity require the same in the contrary situation? *Cf. Amador-Gonzalez v. U.S.*, 391 F.2d 308, 313 (CA5): "State law determines the lawfulness of arrests by state officers, subject, of course, to constitutional restraints.")

CONCLUSION

For the above reasons the Petition for Writ of Certiorari should be granted, the judgment below reversed, and the trial court directed to suppress the evidence and dismiss the indictment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I am a member in good standing of the bar of this Court and that I duly served copies of the foregoing petition on the Solicitor-General of the United States and on the United States Attorney for the Southern District of Florida on July ....., 1971.

ALBERT M. HORN

APPENDIX A

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27213

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES LARRY PENNINGTON,

Defendant-Appellant.

(April 20, 1971)

ON PETITION FOR REHEARING

Before COLEMAN, SIMPSON, and MORGAN, Circuit Judges.

COLEMAN, Circuit Judge. This is the second appeal in this case. Our prior decision, on other issues, is reported at 392 F.2d 421 (1968).

We originally decided the instant appeal on June 29, 1970. Seven days previously, the Supreme Court had decided *Chambers v. Maroney*, 1970, 399 U.S. 421, 90

S.Ct. 1975, 26 L.Ed.2d 419. Since our June 29 decision had been reached without the benefit of *Maroney*, we granted petition for rehearing August 12, 1970, and directed that additional briefs be filed. We now withdraw the opinion of June 29 and substitute the following as the opinion of the Court.

For a second time James L. Pennington was convicted by a jury of violating 15 U.S.C.A., §902 (e), which makes it unlawful for a person previously convicted of a felony to transport a firearm [in this instance a .45 calibre pistol] in interstate commerce. We affirm.

At approximately 2:30 in the early morning of October 18, 1965, two Miami Beach police officers saw an automobile proceeding at a very high, unlawful rate of speed. They gave pursuit, with sirens and emergency lights, for twenty-five to thirty city blocks, during which the speed of the automobile, at times, exceeded eighty miles an hour. During the chase one of the officers got close enough to observe the license plate, from which he knew, if the plate was valid, from the presence of the letter E, that the automobile was a rental car. When the officers finally succeeded in stopping Pennington they asked him to produce his driver's license and the rental contract. He had no rental papers but did submit a duplicate driver's license issued in the State of Georgia.

He was then arrested for reckless driving.

At the second trial, on motion to suppress, Police Officer Edwin Young, in addition to the facts already recited, testified that Pennington was charged with reckless driving because his offense involved more than

speeding, that is, disregarding traffic lights, improper left turns, and improper lane usage. In Dade County, if one is charged with reckless driving, leaving the scene of an accident, or driving while under the influence of intoxicants (rather than for such matters as speeding, driving without a license, or running a stop sign) the individual arrested is not released with a citation but must go to the station house and post cash collateral before being released.

The City of Miami Beach has no wreckers or parking facilities for impounded vehicles. The policy is that if one is arrested and taken to the station house to post collateral his car is impounded, a wrecker is called from a rotating list of privately operated wreckers, the contents of the car are inventoried in the presence of the owner, the list signed by the officer, and the car, with contents, then turned over to the wrecker company, from which the operator can later retrieve it.

This was the procedure followed in Pennington's case.

Pennington was under arrest, but present, when the car was checked to ascertain and inventory its contents.

Officer Young testified as follows:

"Q. What was your purpose of looking through the automobile, which resulted in the discovery of this weapon?

"A. To inventory any valuables in the vehicle.

"Q. Did you also seek to determine if there were any weapons that might have been used for escape, or to cause harm to the arresting officer? [the form of the question was not objected to].

"A. At the time we hadn't established whose car it was, so you couldn't prove ownership, and that's correct. Yes, sir.

"Q. Then it was your further purpose in determining if there were any indicia of ownership inside of the automobile?

"A. Yes, sir.

"Q. But the defendant was unable to produce any indicia of ownership or rental contract at the time the arrest was made; is that correct?

"A. The only identification the defendant had was a duplicate license, no other papers at all on himself or in the car."

As it turned out, the car contained nothing to inventory but the pistol in question, which was found in the glove compartment by Officer Tom Wilson, who, in his patrol car, had participated in the chase which overhauled Pennington.

At a later point Officer Young testified:

"Q. Was it your only purpose then to conduct an inventory and to determine who was the owner, see if there were any ownership papers? Is that the only reason?

"A. Well, yes, sir, basically.

"Q. And then you said also to see if there were any weapons; is that right?

"A. Yes.

"Q. In other words, to protect yourself and Officer Wilson?

"A. Well, the man had acted suspiciously for some reason we did not know why at the time. We were a little leery of him.

"Q. When he stopped and you stopped him, he got out of his car and came back toward you?

"A. Yes.

"Q. Did he give you any trouble?

"A. No, sir.

"Q. He was cooperative?

"A. Yes, sir."

The testimony of Officer Wilson was substantially similar to that of Officer Young.

The pistol was taken to police headquarters and there turned over to the property custodian.

The District Court denied the motion to suppress the pistol as evidence in the case. The conviction followed. The question then, is whether the procedure by which this pistol was found and seized squares with Fourth Amendment guaranties against unreasonable searches and seizures.

We observe first that there is no claim that Pennington was arrested because the officers believed, with probable cause, that the vehicle had been stolen. With 780,000 cars stolen in this Country in 1968, the facts here might well have supplied such probable cause, but that was not the motive for the search.

Next, a search for deadly weapons was not necessary

for the protection of the officers because Pennington was not within reach of the automobile and had made no move toward trying to reach it. The car and the contents, in this respect, were no longer under his immediate control, *Preston v. United States,* 1964, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777.

The validity of a search and seizure must be decided on the facts and circumstances in each particular case, *Leffler v. United States,* 8 Cir., 1969, 409 F.2d 44.

There is nothing in the case now before us to indicate that the examination of the contents of Pennington's rented car was pretextual. The officers had not expected an encounter with Pennington. When he came by at a high rate of speed at 2:30 o'clock in the morning, they gave chase, with sirens and emergency lights, solely for the purpose of apprehending a traffic violator. He was not arrested for a minor traffic violation, such as driving without a valid license, simple speeding, running a stop sign, or like conduct. He was charged with the offense of reckless driving because the speed was accompanied by other traffic infractions, of great danger to the travelling public. The officers were not looking for contraband or for evidence of the offense of reckless driving. The appellant had already committed that offense in their presence. There is no evidence to the effect that the procedure here involved was used as a scheme for avoiding the necessity for search warrants. If Pennington had done nothing more than to speed, or drive without a license, or run a stop sign, he would not have been arrested but merely given a citation.

Personal effects lawfully contained within lawfully impounded automobiles must be protected for the bene-

fit of the owners. Officers cannot send property off in the custody of others without knowing what is due to be returned. The only reasonable method for the prevention of such an occurrence after a valid arrest necessitating the detention of the automobile is to inventory contents and take receipts from the person who is thereafter to be responsible. That was clearly the real purpose of the inventory here undertaken, which uncovered the pistol.

Chambers v. Maroney, supra, noted, Fn. 10, 90 S.Ct. at 1981:

> "It was not unreasonable in this case to take the car to the station house. All occupants in the car were arrested in a dark parking lot in the middle of the night. A careful search at that point was impractical and perhaps not safe for the officers, and it would serve the owner's convenience and the safety of his car to have the vehicle and keys together at the station house."

As to automobiles in a highly mobile environment, the Courts, as in *Maroney*, are measuring reasonableness in the light of inescapable realities, see, *e.g., United States v. Johnson*, 5 Cir., 1969, 413 F.2d 1396 (panel) and 431 F.2d 441 (en banc).

This, of course, must be done with due regard for the principle that those lawfully entitled to use the public highways have a right to free passage without being subjected to unreasonable search and seizures, *Carroll v. United States*, 1925, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 453.

Under the facts of this case we hold that the pistol was not the fruit of an unlawful search or seizure.

The judgment of the District Court is

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27213

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES LARRY PENNINGTON,

Defendant-Appellant.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(June 8, 1971)

Before COLEMAN, SIMPSON and MORGAN, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27213

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES LARRY PENNINGTON,

Defendant-Appellant.

(June 29, 1970)

COLEMAN, Circuit Judge: This is the second appeal in this case. Our prior decision, on other issues, is reported at 392 F.2d 421 (1968).

For a second time James L. Pennington was convicted by a jury of violating 15 U.S.C.A., §902(e), making it unlawful for a person previously convicted of a felony to transport a firearm [in this instance a .45 calibre pistol] in interstate commerce. We reverse and remand, with directions.

At approximately 2:30 in the early morning of October 18, 1965, two Miami Beach police officers saw an automobile proceeding at a very high, unlawful rate of

speed. They gave pursuit, with sirens and emergency lights, for twenty-five to thirty city blocks, during which the speed of the automobile, at times, exceeded eighty miles an hour. During the chase one of the officers got close enough to observe the license plate, from which he knew, if the plate was valid, from the presence of the letter E, that the automobile was a rental car. When the officers finally succeeded in stopping Pennington they asked him to produce his driver's license and the rental contract. He had no rental papers but did submit a duplicate driver's license issued by the State of Georgia.

He was then arrested for reckless driving.

At the second trial, on motion to suppress, Police Officer Edwin Young, in addition to the facts already recited, testified that Pennington was charged with reckless driving because his offense involved more than speeding, that is, disregarding traffic lights, improper left turns, and improper lane usage. In Dade County, if one is charged with reckless driving, leaving the scene of an accident, or driving while under the influence of intoxicants (rather than for such matters as speeding, driving without a license, or running a stop sign) the individual arrested is not released with a citation but must go to the station house and post cash collateral before being released.

The City of Miami Beach has no wreckers or parking facilities for impounded vehicles. The policy is that if one is arrested and taken to the station house to post collateral his car is impounded, a wrecker is called from a rotating list of privately operated wreckers, the contents of the car are inventoried in the presence of the owner, the list signed by the officer, and the car, with

contents, then turned over to the wrecker company, from which the operator can later retrieve it.

This was the procedure followed in Pennington's case.

Pennington was already under arrest when the car was searched to ascertain its contents.

Officer Young testified as follows:

"Q. What was your purpose of looking through the automobile, which resulted in the discovery of this weapon?

"A. To inventory any valuables in the vehicle.

"Q. Did you also seek to determine if there were any weapons that might have been used for escape, or to cause harm to the arresting officer? [the form of the question was not objected to].

"A. At the time we hadn't established whose car it was, so you couldn't prove ownership, and that's correct. Yes, sir.

"Q. Then it was your further purpose in determining if there were any indicia of ownership inside of the automobile?

"A. Yes, sir.

"Q. But the defendant was unable to produce any indicia of ownership or rental contract at the time the arrest was made; is that correct?

"A. The only identification the defendant had was a duplicate license, no other papers at all on himself or in the car."

As a matter of fact, the car contained nothing to

inventory but the pistol in question, which was found in the glove compartment by Officer Tom Wilson, who, in his patrol car, had participated in the chase which overhauled Pennington.

At a later point Officer Young testified:

"Q. Was it your only purpose then to conduct an inventory and to determine who was the owner, see if there were any ownership papers? Is that the only reason?

"A. Well, yes, sir, basically.

"Q. And then you said also to see if there were any weapons; is that right?

"A. Yes.

"Q. In other words, to protect yourself and Officer Wilson?

"A. Well, the man had acted suspiciously for some reason we did not know why at the time. We were a little leery of him.

"Q. When he stopped and you stopped him, he got out of his car and came back toward you?

"A. Yes.

"Q. Did he give you any trouble?

"A. No, sir.

"Q. He was cooperative?

"A. Yes, sir."

The testimony of Officer Wilson was substantially similar to that of Officer Young.

The pistol was taken to police headquarters and there turned over to the property custodian.

The District Court denied the motion to suppress the pistol as evidence in the case. The conviction followed. The question then is whether the procedure by which this pistol was found and taken squares with Fourth Amendment guaranties against unreasonable searches and seizures.

We observe first that there is no claim that Pennington was arrested because the officers believed, with probable cause, that the vehicle had been stolen. With 780,000 cars stolen in this Country in 1968, the facts here might well have supplied such probable cause, but that was not the motive for the search.

Next, a search for deadly weapons was not necessary for the protection of the officers because Pennington was not within reach of the automobile and had made no move toward trying to reach it. The car and the contents, in this respect, were no longer under his immediate control. *Preston v. United States*, 1964, 376 U.S. 364, 84 S.Ct. 881, 11 L.Ed.2d 777.

Moreover, this was not a matter of identifying the automobile by examining a secret serial number, the location of which is known in advance to the inspecting officer, as in *United States v. Johnson*, 5 Cir., 1969, 413 F.2d 1396.[1] The inspection here was of the *contents* of the vehicle, with no showing that the search was for articles relevant to the offense for which Pennington had been arrested, see *Wellman v. United States*, 5 Cir., 1969, 414 F.2d 263.

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[1] *United States v. Johnson* is now under review by this Court en banc.

Our decision in *Amador-Gonzalez v. United States*, 391 F.2d 308 (1968) provides no answer to the pending question because that case went off on the pretextuality of the arrest.

We are thus brought face to face with the contention of the Government that the discovery of this pistol while inventorying the contents of the car preparatory to being towed away did not violate the Fourth Amendment.

In *Harris v. United States*, 1968, 390 U.S. 234, 88 S.Ct. 992, 19 L.Ed.2d 1067, the automobile, previously used by a suspected robber, had already been impounded. It had been at the precinct for about an hour and a quarter after the arrest. The car windows were open, the door was unlocked, and it was raining. It was the duty of the officer to remove all valuables from the automobile and to perform certain other acts. He proceeded to "search the vehicle" [to locate the valuables], to place a property tag on it, to roll up the windows, and to lock the doors. As described by the Supreme Court:

> "The officer entered on the driver's side, searched the car, and tied a property tag on the steering wheel. Stepping out of the car, he rolled up an open window on one of the back doors. Proceeding to the front door on the passenger side, the officer opened the door in order to secure the window and door. He then saw the registration card, which lay face up on the metal stripping over which the door closes."

Said the Supreme Court:

> "The sole question for our consideration is whether the officer discovered the registration card

by means of an illegal search. We hold that he did not."

It was said that the discovery of the card, in plain view once the door was opened, was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. The Supreme Court held that "Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances". This was tied to the elaboration that "Once the door had lawfully been opened, the registration card, with the name of the robbery victim on it, was plainly visible".

Pennington's facts are not the same, although similar. All that the *Harris* officer was doing when he discovered the registration card was rolling up a car window and preparing to lock a door. He was looking for nothing and expecting nothing.

In the case now before us, the officer had to open two doors, the car door and the glove compartment door. Once he opened the latter, however, the pistol was in full view. The basic purpose of the officer was to look for objects in the vehicle for the purpose of preserving them while the car was impounded. Officer Young further testified, however, that another purpose of the search was to "see if there were any weapons", so as to protect himself and the other officer.

The validity of a search and seizure must be decided on the facts and circumstances in each particular case, *Leffler v. United States,* 8 Cir., 1969, 409 F.2d 44. Since *Harris v. United States,* supra, is not on factual all-fours with Pennington's case, we are confronted with the duty of deciding the validity of the examination of

the contents of his automobile on its own facts. Ordinarily, a search implies an examination of an individual or of his property to discover contraband or evidence of some violation of the law, *DiMarco v. Greene*, 6 Cir., 1967, 385 F.2d 556.

There is nothing in the case now before us to indicate that the examination of the contents of Pennington's rented car was pretextual. The officers had not expected an encounter with Pennington. When he came by at a high rate of speed at 2:30 o'clock in the morning, they gave chase, with sirens and emergency lights, solely for the purpose of apprehending a traffic violator. He was not arrested for a minor traffic violation, such as driving without a valid license, simple speeding, running a stop sign, or like conduct. He was charged with the offense of reckless driving because the speed was accompanied by other traffic infractions, of great danger to the travelling public. The officers were not looking for contraband or for evidence of the offense of reckless driving. The appellant had already committed that offense in their presence. There is no evidence to the effect that the procedure here involved was ever used as a scheme for avoiding the necessity for search warrants.

Surely, it is both reasonable and desirable that personal effects contained within impounded automobiles should be protected for the benefit of the owners.

The procedure followed by the police officers in this case might well have been reasonable, and no search warrant required, if preservation of the contents had been the sole purpose of the activity. We do not decide the point because of the presence of another factor.

That factor is found in the testimony of Mr. Young

that the arresting officers were also looking "for any weapon" in order to protect themselves. Nothing was found in the car but a weapon, a forty-five pistol, fully loaded. That weapon provided the essential ingredient of this prosecution. It had no relevancy to the traffic offense for which Pennington had been arrested, it was not a fruit of that offense, and it posed no threat to the safety of the arresting officers. Pennington was already in custody, some distance from the car, making no move toward the vehicle.

That being true, the vehicle could not lawfully be searched without a warrant. The motion to suppress the weapon as evidence should have been granted.

The judgment of the District Court is reversed and remanded, with directions that the indictment be dismissed.

REVERSED and REMANDED, with directions.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27213

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES LARRY PENNINGTON,

Defendant-Appellant.

(August 12, 1970)

ON PETITION FOR REHEARING

BY THE COURT:

IT IS ORDERED that:

(a) The appellee's petition for rehearing is granted upon the question of whether our judgment of reversal should be permitted to stand in light of *Chambers v. Maroney,* No. 830, [decided June 22, 1970] 38 L.W. 4547, and four cases decided by the Supreme Court on June 29, 1970: *Perini v. Colosimo,* No. 801, ___ U.S.

_____ (1970) 38 L.W. 3520; *Crouse v. Wood,* No. 936, _____ U.S. _____ (1970) 38 L.W. 3520; *Hocker v. Heffley,* No. 1195, _____ U.S. _____ (1970) 38 L.W. 3520, and *Kelley v. Arizona,* 1232 Misc., 38 L.W. 3521, vacating the judgments below and remanding the cases to the respective courts below for reconsideration in light of *Chambers v. Maroney:*

(b) The parties are directed to file their respective briefs simultaneously within thirty (30) days from the date of this order. The Court will consider the case on rehearing without further oral argument unless the same is directed by our further order. Typewritten briefs, an original and four copies, will suffice. See Rule 40(a), Federal Rules of Appellate Procedure.

UNITED STATES OF AMERICA
v.
JAMES LARRY PENNINGTON

NO. 66-384-Cr-TC

JUDGMENT

On this 10th day of January, 1969, came the attorney for the government and the defendant appeared in person and by counsel, Albert M. Horn, Esq.

It is ADJUDGED that the defendant upon his plea of Not Guilty and a Court finding of guilty has been convicted of the offense of transporting a firearm in interstate commerce after having been convicted of a felony, in violation of Title 15, United States Code, Section 902 as charged in the one count indictment and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It is ADJUDGED that the defendant is guilty as charged and convicted.

It is ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of TWO (2) YEARS, pursuant to the provisions of Title 18, USC, Chapter 311, Section 4208(a)(2), it being further

Ordered that you shall become eligible for parole at such time as the Board of Parole may determine.

It is ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States

Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ TED CABOT

TED CABOT
United States District Judge

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 27213

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

JAMES LARRY PENNINGTON,

Defendant-Appellant.

JUDGMENT ON PETITION FOR REHEARING

This cause came on to be heard on defendant-appellant's petition for rehearing;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the opinion originally entered by this Court dated June 29, 1970, is withdrawn; and the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

April 20, 1971

Issued As Mandate: June 16, 1971